The City demurred to the causes of action alleging violation of State and Federal procedural due process, substantive due process, equal protection, and inverse condemnation and the cause of action for damages under 42 U.S.C. § 1983. The trial court (1) sustained the City's demurrer to the procedural due process, substantive due process and inverse condemnation claims without leave to amend, (2) sustained the City's demurrer to the equal protection claims with leave to amend and (3) sustained the City's demurrer to the section 1983 claim (thirteenth cause of action) with leave to amend with respect to the federal equal protection theory and without leave with respect to the other theories. (Pet. for Cert., App. D at 25a-33a.)

On May 31, 2002, Petitioner filed a Second Amended Petition and Complaint ("Second Amended Petition" or "SAP"). Petitioner alleged only six causes of action against the City. Specifically, the SAP re-alleged Petitioner's claims of (1) violation of CEQA, (2) violation of the Government Code sections regarding adoption of a general plan amendment, (3) request for declaratory relief claim, (4) violations of state and federal equal protection claims, and (5) damages under 42 U.S.C. § 1983.

On October 21, 2002, the City moved for summary adjudication with respect to each cause of action against the City. The trial court granted the City's motion in full on April 17, 2003. On October 6, 2003, the trial court entered judgment against Petitioner and in favor of the City with respect to all the causes of action alleged against the City in both the FAP and the SAP. (Pet. for Cert., App. D at 20a-24a.)

Prior to the entry of judgment, Petitioner filed a Notice of Appeal (June 16, 2003) and an Amended Notice of Appeal (September 2, 2003). On October 15, 2003, after the entry of judgment, Petitioner filed a Second Amended Notice of Appeal. On March 23, 2005, the Court of Appeal issued an unpublished opinion affirming the trial court judgment in full. (Pet. for Cert., App. C.)

On April 8, 2005, Petitioner submitted a petition for rehearing to the Court of Appeal. On April 18, 2005, the Court of Appeal issued an Order Modifying Opinion and Denying Rehearing [No Change in Judgment]. (Pet. for Cert., App. B.)

Petitioner thereafter petitioned for review with the California Supreme Court. The California Supreme Court denied Petitioner's Petition for Review on June 8, 2005. Petitioner now seeks review in this Court of the denial of his constitutional claims based upon an alleged conflict amongst state and the circuit courts of appeal as to the *Williamson County* ripeness test.

REASONS FOR DENYING THE PETITION

A. The Petition Does Not Address Petitioner's First Question.

Petitioner first asks whether state and local governments may impose an "exaction" like the kit fox mitigation agreement as a pre-condition to holding a hearing on his development application. Perhaps because the facts do not support his allegations, Petitioner never addresses this substantive question. The City nevertheless addresses the merits of his question out of an abundance of caution.

Petitioner's first question fails to establish the necessity of this Court's review for two key reasons. First, Petitioner ignores the fundamental rule that the City *may* "take" or regulate property for public use – the only question is whether such a taking requires the payment of just compensation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). The obvious answer to Petitioner's question is thus "yes," the City may impose such a condition.

Second, regardless of whether the mitigation agreement under different circumstances might constitute a taking or exaction, there has been no such taking here. The mitigation agreement was expressly contingent upon the approval of Petitioner's development application for Chandler Ranch. That development application was denied, and Petitioner did not challenge the City's denial of the application. He never paid any money for kit fox mitigation either before or after the June 19, 2001 City Council hearing. As the Court of Appeal noted, "the [mitigation] agreement was dependent on the City's approval of his master plan application. Whatever merit the argument may have had, it became moot when the City denied his application." (Pet. for Cert., App. B at 3a.) The mitigation agreement could not constitute an exaction and Petitioner has suffered no damages because Petitioner was never required to pay any money pursuant to that agreement.

B. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

Petitioner's remaining issues rest on the mistaken presumption that the Court of Appeal disposed of all of his constitutional claims based upon application of the first and second prong ripeness requirements in *Williamson County*. Petitioner asserts that review is necessary to resolve alleged inconsistencies between the state and federal courts as to the application of *Williamson County* to his constitutional claims. The state Court of Appeal, however, did not decide these questions in this proceeding. Moreover, the facts of record will not support a determination of these questions by the Court.

1. The State Court Of Appeal Denied Petitioner's Equal Protection Claims On The Merits; Thus *Williamson County*'s Ripeness Test And Any Alleged Court Split As To Its Application Are Irrelevant To This Case.

Petitioner's assertion that determination of whether the equal protection claims should be subject to the *Williamson County* ripeness tests generally applied to takings claims is irrelevant to the instant proceeding. The Court of Appeal did not dismiss Petitioner's equal protection claims on ripeness grounds. Rather, the Court of Appeal determined that whatever merit Petitioner's equal protection claim may have had with respect to the kit fox mitigation agreement, it became moot when the City denied his application because the agreement was expressly dependent on the City's approval of his master plan application. (Pet. for Cert., App. B at 3a.).

As to Petitioner's assertion that he was treated differently from other similarly-situated property owners when the City adopted a specific plan requirement for the Chandler Ranch, the Court of Appeal denied this claim on the merits. The Court of Appeal recognized that there were other properties within the City other than the Chandler Ranch that were also subject to a specific plan requirement. (Pet. for Cert., App. C at 18a.) Further:

> All other properties within the city that [Petitioner] claims are similar to the Chandler Ranch are significantly smaller. Two of the properties that [Petitioner] claims are similar are a 400-acre golf course and a 40-acre park. A golf course and a park are substantially different than [Petitioner's] proposed residential subdivision. The undisputed facts show that any difference in treatment between the Chandler Ranch and other parcels within the city has a rational basis. (Pet. for Cert., App. C at 18a.)

It is clear from the above holding that Petitioner's petition lacks the essential factual predicate of his question presented – i.e., a dismissal of his equal protection claims on ripeness grounds. Resolution of any alleged conflict regarding the application of *Williamson County*'s ripeness tests to equal protection claims will not provide any redress here. In essence, Petitioner seeks to have this Court render an impermissible advisory opinion.

2. Deciding The Question Presented Would Not Provide Any Relief For Petitioner With Respect To His Temporary Takings Claim.

a. There Is No Conflict As To The Application Of *Williamson County*'s Ripeness Tests To Temporary Takings Claims.

"It was settled well before *Williamson County* that 'a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. ___, 125 S. Ct. 2491 (2005) (quoting *Williamson County*, 473 U.S. at 186). None of the cases Petitioner cites questioned the application of this final decision prong of the ripeness inquiry to temporary takings claims. Indeed, this Court's own recent decision in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-40 (2002) seems to have decided this issue, recognizing that the ripeness inquiry is applicable to *all* takings claims. In *Tahoe-Sierra*, this Court reiterated the "strict ripeness requirement" imposed on landowners asserting a regulatory takings claim. Requiring planners to compensate for alleged temporary takings before making a final decision would "create a perverse system of incentives" wherein "landowners must wait for takings claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay." *Id.* at 340. Stated another way, the ripeness inquiry is applicable to all takings claims; to hold otherwise would create absurd results. There is no conflict as to the application of the

Williamson County ripeness inquiry to temporary takings claims.

b. The State Court Of Appeal Denied Petitioner's Temporary Takings Claim On The Merits, And Thus *Williamson County*'s Ripeness Test And Any Alleged Court Split As To Its Application Are Irrelevant To This Case.

Alternatively, the Court of Appeal denied Petitioner's takings claims on the merits, holding that any delay in certifying the EIR was an ordinary delay in the planning process which did not preclude all beneficial use of his property. (Pet. for Cert., App. C at 10a) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987), "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

3. There Is No Conflict Amongst The Courts Concerning The Application Of *Williamson County*'s Ripeness Tests To Due Process Claims Where, As Here, Such Claims Are Ancillary To A Takings Claim.

Petitioner again misrepresents the Court of Appeal's opinion as to his procedural and substantive due process claims. The Court of Appeal did not dismiss Petitioner's due process claims solely on the basis of the *Williamson County* ripeness requirements. The Court of Appeal recognized that Petitioner's due process claims were

simply a reiteration of his takings claim. As such, Petitioner was required to satisfy the *Williamson County* ripeness requirements. (Pet. for Cert., App. C at 12a.) (citing *Armendariz v. Penman*, 75 F.3d 1311, 1324-26 (9th Cir. 1996)). Although "certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands," this Court has instructed that plaintiffs may not "double up" constitutional claims in this way. *Armendariz*, 75 F.3d at 1320. Where a claim can be analyzed under "an explicit textual source" of rights in the Constitution, a court may not also assess the claim under another "more generalized" source. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

a. Petitioner's Due Process Claims Simply Reiterate His Takings Claim, And Thus Are Subject To Traditional Ripeness Requirements.

Here, because the Fifth Amendment takings clause supplies an explicit textual source of constitutional protection when the government is alleged to have deprived a plaintiff of the economically beneficial use of his property, the takings clause and not the due process clause governs the constitutionality of the City's actions. Petitioner should not be permitted to avoid the ripeness requirements simply by recasting his claims as a due process violation. (Pet. for Cert., App. C at 12a.)

This Court in *Williamson County* determined that whether cast as a takings or a question of due process, a claim is premature if the essential argument, as here, is that a regulation "goes too far" as an invalid exercise of the police power. 473 U.S. at 199. Such an inquiry requires the court to resolve the same difficult issue of how to

define "too far." *Id.* Resolution of this question depends, as to a takings claim, in significant part upon an analysis of the effect of the government's actions and regulations on the value of the plaintiff's property and investment-backed investment expectations. *Id.* at 199-200. "That effect cannot be measured until a final decision is made as to how the regulations will be applied to [Petitioner's] property." *Id.* at 200.

No such final determination was made as to Petitioner's claims. The City denied Petitioner's Master Plan Application following a public hearing, but he never appealed this decision. The City never made any decision on his second application because his option expired before any decision could be made. The adoption of a general plan amendment requiring that a specific plan be submitted with development applications for the Chandler Ranch is irrelevant. The City has never made a final determination of the extent of permitted development. As in *Williamson County,* Petitioner's claims are premature, whether analyzed as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Fifth Amendment's just compensation clause (made applicable to state and local governments through the Fourteenth Amendment).

The Court of Appeal's analysis comports with this Court's decisions applying the final decision ripeness test to due process claims where, as here, they are based upon the same set of facts and circumstances giving rise to the petitioner's takings claims. Contrary to Petitioner's assertions, the cases he cites do not conflict with this interpretation. These decisions reveal that the final determination rule is regularly applied to due process claims challenging the process by which officials reach

land use decisions as this Court instructed in *Williamson County*. *See, e.g., Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1293-94 (3d Cir. 1993); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 n.1 (9th Cir. 1988); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573-74 (11th Cir. 1989).[3] The only time the courts have refused to apply this strict ripeness test is where the due process claim is not ancillary to the takings claim. *See Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). Only in this narrow situation, not relevant here, have the courts found *Williamson County* inapplicable. Accordingly, there is no conflict for this Court to resolve because it is well-settled that due process claims ancillary to a takings claim may not be used to avoid a ripeness inquiry.

b. Resolution Of The Question Presented Is Not Necessary Because Petitioner's Due Process Claims Fail Regardless Of Whether Or Not They Are Ripe Under *Williamson County*.

The Court of Appeal went on to address the merits of Petitioner's substantive due process claims related to the

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[3] Petitioner contends that in *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), the Eleventh Circuit, in dicta, "stated that it is 'not at all clear' that first prong ripeness should apply to a substantive due process claim premised upon arbitrary governmental action." Petition, 17-18. The Eleventh Circuit made no such statement. The Eleventh Circuit noted that it was "not at all clear" that this Court's re-application requirement for finality in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) was also required to satisfy the final determination standard for substantive due process claims, or that it applied in precisely the same manner. *Greenbriar, Ltd.*, 881 F.2d at 1576 n.11. The *Greenbriar* court never questioned the applicability of the final determination test under *Williamson County* to due process claims.

City's renewal of a specific plan requirement. The Court of Appeal recognized the uniqueness of the Chandler Ranch – 673 acres of the most extensive oak woodland in the City, surrounded by steep hillsides that present a significant challenge to vehicular access and development. (Pet. for Cert., App. C at 17a.) As the Court of Appeal concluded, "On its face, this is the type of parcel for which a specific plan can be beneficial. The City has a legitimate public interest in requiring a specific plan to preserve the parcel's natural resources and prevent piecemeal development." (*Id.*) (citing *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)).

Similarly, Petitioner's procedural due process claims are without merit as Petitioner has not shown a liberty or property interest protected by the Constitution. Petitioner could not establish that he was deprived of a property interest, because the City retained substantial discretion in considering the Master Plan Application and General Plan Amendment requiring the specific plan. It is well-settled that general plan amendments and rezonings are legislative acts, over which the City has full discretion. *See, e.g., Yost v. Thomas* 36 Cal. 3d 561, 570 (1984); *Mitchell v. County of Orange* 165 Cal. App. 3d 1185, 1191-92 (1985).

In other words, Petitioner's due process claims rest on the bald assertion that he was denied all beneficial use of his property because the City delayed acting on his Master Plan Application before rejecting it. Such an assertion, however, is not supported by the facts or law. The City processed Petitioner's Master Plan Application in just two years from the date he claims it was "deemed complete." Given the substantial development proposed on a very

unique piece of property that required significant environmental review, such a delay did not amount to an unconstitutional deprivation of due process or a taking without just compensation. Petitioner had no entitlement to expedited processing of his application simply because his option was about to expire. Petitioner assumed the risk that his option might expire before the normal entitlement process ran its course, particularly when unique property was involved and the proposed development deviated significantly from existing approved uses. *See Mola Dev. Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405, 416-17 (1997). As this Court recently explained in holding that a 32-month planning moratorium did not constitute a *per se* taking:

> The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether.

Tahoe-Sierra Pres. Council, 535 U.S. at 339. This would, in turn, foster "inefficient and ill-conceived growth." *Id.*

Accordingly, even if there are conflicting decisions over the application of the final determination rule to due process claims stemming from land use decisions, resolution of such a conflict would not provide any relief to Petitioner because his due process claims fail regardless of whether or not they are ripe under *Williamson County*.

C. The Court Of Appeal's Decision Did Not Deny Petitioner Any Adequate State Law Remedies For His Constitutional Rights.

Petitioner's final question asks whether mandamus is a sufficient remedy to preclude recovery of damages under section 1983. Petitioner asserts that the Court of Appeal's denial of his claims for failure to pursue mandamus to compel the City to hold a hearing on the EIR and his Master Plan Application deprived him of a remedy under section 1983. Petitioner's question presented again grossly mischaracterizes the Court of Appeal's holding.

1. The Court Of Appeal Dismissed Petitioner's Claim On The Merits, And Thus Review Of State Law Mandamus Procedures Is Not Necessary.

The Court of Appeal did not deny Petitioner a remedy under section 1983. Petitioner ignores the fact that the Court of Appeal denied his takings claim regarding the alleged delay in certifying the EIR on the *merits*. The Court of Appeal recognized that any delay in certifying the EIR was one of the "normal delays" common in the planning process and did not deprive him of all economically beneficial use of his property. Delaying certification of the EIR "simply delayed consideration of one proposed economically beneficial use." (Pet. for Cert., App. C at 10a.) Petitioner still had the option of proposing a development plan in compliance with the then-existing zoning and general plan requirements for the Chandler Ranch. (*Id.*) (distinguishing *First English, supra,* 482 U.S. 304 (1987)). Only after determining this issue on the merits did the court go on to hold that Petitioner's takings claim was also subject to dismissal for failure to pursue a remedy in

mandate. (*Id.*) Again, Petitioner seeks to have this Court render an improper advisory opinion.

2. Alternatively, The Court Of Appeal's Decision Does Not Raise The Question Petitioner Now Presents To This Court Because Exhaustion Of Mandamus Procedures Merely Aids The Courts In Determining Whether A Taking Has Gone "Too Far," And Does Not Hamper Petitioner's Right To Seek Compensation Under Section 1983 If A Taking Has Indeed Occurred.

Even assuming *arguendo* that the Court of Appeal had not reached the merits of the claim, the Court of Appeal's decision on ripeness grounds does not raise the question Petitioner now presents to this Court. Although unclear, Petitioner seems to contend that the Court of Appeal imposed "unreasonable procedural impediments" to Petitioner's section 1983 claims by misapplying the second prong of the *Williamson County* ripeness test in holding that Petitioner should have exhausted the available remedy in mandate to compel the City to review the EIR. Again, Petitioner has missed the point.

A petition for writ of mandamus is not a state procedure for seeking compensation (i.e., a procedure that must be exhausted under the second prong of *Williamson County*). Rather, it is a procedure that must be utilized to reach a "final decision." Before the second prong of the *Williamson County* ripeness test is even considered, a petitioner must be able to show that there has been a "final decision" as to the extent to which the beneficial use of any property rights have been impaired by government

action. Petitioner has no remedies to pursue under section 1983 or through a state inverse condemnation claim for "just compensation," until there has been a "final decision" from which a reviewing court can first determine whether there was indeed a "taking." *Williamson County*, 473 U.S. at 191.

Here, the Court of Appeal correctly determined that Petitioner failed to satisfy even this first "final decision" prong by not first pursuing a remedy in mandamus. Under *Williamson County* and the California Supreme Court's decision in *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), a final administrative decision is "one which [has afforded] the administrative agency and any reviewing body having similar authority the opportunity to amend the agency decision and/or grant a variance." *Hensler*, 8 Cal. 4th at 10-11. This means that Petitioner must first attempt to set aside a city's decision through a mandamus action before pursuing damages for a taking or any ancillary due process claims. *See Mola Dev. Corp.*, 57 Cal. App. 4th at 410. "Mandamus proceedings allow courts to flesh out the issues and factual components of the dispute, including issues of procedural fairness. Review by mandamus is necessary because a court 'cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.'" *Id.* at 411.

Petitioner challenged the City's alleged delay in processing the EIR long after the City had certified the EIR. He cannot avoid the final determination requirement by simply waiting until his claim becomes moot. *Id.* at 418; *County of San Luis Obispo v. Superior Court*, 90 Cal. App. 4th 288, 295 (2001).

3. Irrespective Of *Williamson County*'s Second Prong Ripeness Requirement, Petitioner Has Failed To Satisfy Even The First Prong "Final Decision" Requirement.

In addition, Petitioner failed to seek a final decision on a development proposal at Chandler Ranch. Where, as here, the petitioner is not challenging the then-existing zoning or development requirements but merely has submitted one application seeking approvals for a more intensive development, this Court has generally held that the takings claim is not ripe. For example, in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), the county board of supervisors affirmed the county planning commission's rejection of a landowners' subdivision plan. Under the landowner's proposal, the property was to be subdivided into 159 single-family and multi-family residential lots. Although the property was zoned for residential use, the planning commission and board of supervisors rejected the plan because it failed to adequately account for public street access, sewer services, water supplies, and police protection. The landowner did not submit any other development plans and simply filed suit claiming his property rights had been "taken" without just compensation. This Court, however, determined that this single rejection did not constitute a taking. *Id.* at 352-53. In so holding, the Court pointed out that Petitioner had not attempted to obtain approval of a development in accordance with the applicable zoning regulations, and thus there had not yet been a "final determination" because no meaningful application had been made. *Id.* at 353. The possibility still existed that "some development [would] be permitted." *Id.* at 352.

As in *MacDonald*, the City only rejected one development application from Petitioner. Petitioner's Master Plan

Application would have required a general plan amendment and called for nearly five times the number of residential units permitted under the then-existing zoning regulations. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similar unfavorable reviews." *Id.* at 353, n.9; *see also Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 (1978) (declining to find that application of state landmark preservation law effected a taking where committee had only disapproved of 50-story building and property owners had not sought approval for another plan); *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621 (1981) (dismissing appeal because it did not appear that city's rezoning and adoption of an open space plan had deprived utility of all beneficial use of its property).

The City's subsequent requirement that a Chandler Ranch specific plan be prepared did not ripen Petitioner's takings claims because the requirement did not prohibit development or operate as a moratorium. *See Selby Realty Co. v. City of San Buenaventura* 10 Cal. 3d 110, 118-19 (1973) (adoption of general plan amendment may not constitute a taking because it does not represent a final agency decision on the application of the city's land use regulations to the property at issue). The specific plan requirement does not change the already existing allowable uses, nor does it authorize any new, not yet approved development. No development was approved. No entitlements for development were granted. No land use or zoning designation was changed. All the City did was require the adoption of a specific plan before any development could occur. Petitioner let his option expire without submitting a specific plan, and therefore never received

a final determination of what development would be permitted.

CONCLUSION

Petitioner has vastly overstated the significance of *Williamson County* to the specific facts and decision in this case because the questions presented by Petitioner are more theoretical than factual. Petitioner has suffered no constitutional injuries. Petitioner made one development application to the City, which required several legislative acts, including a general plan amendment and rezoning. The City exercised its legitimate discretion in denying that application. The City then exercised its authority to require that a specific plan be prepared for Chandler Ranch. Petitioner submitted no new application and his option expired. No exactions were imposed on Petitioner, and no constitutional rights were violated. The Court of Appeal applied well-settled law to the specific facts of the present case. Its decision is unpublished. This case presents no unique facts and no new law. Therefore, this Court's review is unnecessary.

For all the foregoing reasons, the petition of certiorari should be denied.

Respectfully submitted,

IRIS P. YANG*
MCDONOUGH HOLLAND & ALLEN PC
555 Capitol Mall, 9th Floor
Sacramento, CA 95814-4692

**Counsel for Respondents*
City of El Paso de Robles,
City Council of City of El Paso
de Robles, and Robert Lata